Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

BANNUM, INC. and
BANNUM PROPERTIES, INC.,

Petitioners,

v.

CITY OF FORT LAUDERDALE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249 (1985), rational basis test improperly applied below, when the Eleventh Circuit Court of Appeals failed to properly apply the second prong of the rational basis test in affirming summary judgment in favor of the City of Fort Lauderdale on Bannum's equal protection challenge of section 47-11.1.1(d) of the Fort Lauderdale Code of Ordinances?

2. Was the *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249 (1985), rational basis test improperly applied below, when the Eleventh Circuit failed to properly consider elements of intentional and purposeful discrimination in affirming summary judgment in favor of the City of Fort Lauderdale on Bannum's "as applied" equal protection challenge of section 47-11.1.1(d) of the Fort Lauderdale Code of Ordinances?

PARTIES TO THE PROCEEDING

The caption of the case includes the names of all parties.

TABLE OF CONTENTS

Questions Presented i

Parties To The Proceeding ii

Table Of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement Of The Case 1

A. Proceedings Below 2

B. Factual Background 4

Reasons For Granting The Writ 8

I. Was The *City Of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985), Rational Basis Test Improperly Applied Below, When The Eleventh Circuit Court of Appeals Failed To Properly Apply The Second Prong Of The Rational Basis Test In Affirming Summary Judgment In Favor Of The City Of Fort Lauderdale On Bannum's Equal Protection Challenge Of Section 47-11.1.1(d) Of The Fort Lauderdale Code Of Ordinances? 8

II. Was The *City Of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985), Rational Basis Test Improperly Applied Below, When The Eleventh Circuit Failed To Properly Consider Elements Of Intentional And Purposeful Discrimination In Affirming Summary Judgment In Favor Of The City Of Fort Lauderdale On Bannum's "As Applied" Equal Protection

Page

Challenge Of Section 47-11.1.1(d) Of The Fort Lauderdale Code Of Ordinances? 13

Conclusion 17

APPENDICES:

Appendix A – October 5, 1988 Order of United States Court of Appeals for the Eleventh Circuit affirming district court's grant of summary judgment in favor of the City 1a

Appendix B – May 21, 1990 (as amended May 24, 1990) Order of United States Court of Appeals for the Eleventh Circuit affirming in party, and vacating in part, district court's grant of summary judgment to defendants 12a

Appendix C – December 11, 1998 Order of United States Court of Appeals for the Eleventh Circuit denying Appellants' Petition for Rehearing.....36a

Appendix D – December 11, 1998 Order of United States Court of Appeals for the Eleventh Circuit denying Appellants' Suggestion for Rehearing En Banc.....37a

TABLE OF AUTHORITIES

Case Law:

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985)..... 3, 8, 10, 13, 17

Bannum, Inc., and Bannum Properties, Inc. v. City of Fort Lauderdale, 901 F.2d 989 (11th Cir. 1990) 3, 9

Case Law, continued: Page

Bannum, Inc., and Bannum Properties, Inc. v. City of Fort Lauderdale, 157 F.3d 819 (11th Cir. 1998) 4, 10, 11

Haves v. City of Miami, 52 F.3d 918 (11th Cir. 1995) 4, 9

Plyer v. Doe, 102 S.Ct. 2382 (1982) 13

E & T Realty v. Srickland, 830 F.2d 1107 (11th Cir. 1987) 13, 14

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282 (1979) 14

Federal Constitution:

U.S. Const. Amend. XIV, §1 13

Federal Statutes:

42 U.S.C. §1983 2

State Ordinances:

§47.11, City of Ft. Lauderdale, Fla., Code of Ordinances 4, 6, 10, 14

OPINIONS BELOW

The panel decision of the Court of Appeals, Eleventh Circuit is reported at 157 F.3d 819. App. 1a.

The decision of the District Court on remand is reported at 901 F.2d 989. App. 12a.

The decision of the Court of Appeals denying Bannum's Petition for Rehearing is reported at 166 F.3d 355. App. 36a, 37a.

JURISDICTION

On December 11, 1998, the Court of Appeals for the Eleventh Circuit denied Bannum's timely Petition for Rehearing and Suggestions for Rehearing En Banc. App. 36a, 37a. The judgment sought to be reviewed was entered on October 5, 1998. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action challenges section 47-11.1.1(d) of the City of Fort Lauderdale Code of Ordinances, as written and as applied to Bannum, under which Bannum was required to obtain a special use permit to operate its community treatment centers ("CTC's"), as violative of Bannum's

equal protection rights under the Constitution. Bannum's community treatment centers housed white collar ex-offenders attempting to earn a living and resume their lives outside prison. The City of Fort Lauderdale refused to grant the special use permit to Bannum, unless Bannum shared with the City confidential information about potential residents of the CFC. Ultimately the City cited concern over its disproportionate share of social service facilities, and a concern about community safety, in refusing to grant a special use permit to Bannum. The Bureau of Prisons terminated its contract with Bannum due to its failure to obtain the required zoning permit to operate CFC.

A. Proceedings Below

1. Bannum brought this civil diversity action, pursuant to 42 U.S.C. §1983, in the District Court for the Southern District, seeking damages and declaratory and injunctive relief for the City of Fort Lauderdale's violation of Bannum's federal constitutional rights of substantive process and equal protection of the law by, *inter alia*, arbitrarily and capriciously denying Bannum its right to operate a supervised residential program for ex-offenders without any rational basis for doing so, and treating Bannum's use of the property in question differently from other similar and identical uses within the City without rational basis. On October 6, 1988, the District Court for the Southern District granted summary judgment in favor of the City.

2. Bannum appealed the District Court's decision to the Court of Appeals for the Eleventh Circuit, which held that the City of Fort Lauderdale was responsible, under color of law, for its specific decisions regarding Bannum's location of its residential program in Fort Lauderdale.

Bannum, Inc., and Bannum Properties, Inc. v. City of Fort Lauderdale, 901 F.2d 989, 996-99 (11th Cir. 1990). In addition, the Eleventh Circuit held that "the apparent attempt by Fort Lauderdale to foreclose Bannum's program within its city limits must be analyzed carefully for constitutional violations," *id.* at 1000, and that "the district court's consideration of plaintiff-appellants' constitutional claims regarding the subject special use permit ordinance, including violation of equal protection, facially and as applied, and due process, should involve analysis of the *analogous case of City of Cleburne v. Cleburne Living Center,* 473 U.S. 432. . . . ," *id.* at 999 n.30 (emphasis added). As such, the Eleventh Circuit remanded the case back to the District Court for a decision consistent with the above.

3. On remand in the District Court, Bannum filed an amended complaint, to which the City of Fort Lauderdale answered. The City thereafter filed, with leave of court, additional affirmative defenses. After more discovery and an unsuccessful mediation, the District Court invited the parties to submit cross motions for summary judgment.

On May 2, 1995, the parties filed their cross motions for summary judgment, along with a joint record in support. On April 11, 1997, the District Court entered its order on these motions, granting summary judgment in the City's favor and denying summary judgment for Plaintiffs.

4. Bannum appealed the District Court's granting of summary judgment in the City's favor to the Eleventh Circuit. On October 5, 1998, the Eleventh Circuit held that the zoning ordinance requiring a special use permit for operation of a "custodial facility" within the City of Fort Lauderdale did not violate equal protection or due

process, either on its face or as applied. The Eleventh Circuit stated that section 47-11.1.1(d) would survive rational basis scrutiny "[a]s long as [the] reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational[.]" *Bannum v. City of Fort Lauderdale*, 157 F.3d 819, 822 (11th Cir. Fla. 1998), *citing Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995). The Eleventh Circuit held that the City's "general welfare" interests of public safety and conservation of municipal resources were "legitimate," and that "the enactment and enforcement of section 47-11.1.1(d) is sufficiently related to the above-stated municipal interests." *Bannum*, 157 F.3d 819, 823.

5. Bannum filed a Petition for Rehearing and Suggestion Of Rehearing En Banc, with the Court of Appeals, Eleventh Circuit, which was denied on December 11, 1998.

B. Factual Background

Bannum, Inc. and Bannum Properties, Inc. (collectively "Bannum") are Kentucky corporations authorized to transact business in the State of Florida. App. 2a, 14a. Bannum provides supervised residential programs nationally for ex-offenders in conjunction with the United States Department of Justice, Bureau of Prisons. App. 2a, 14a. The program participants are convicted felons of non-violent, essentially white-collar, crimes, such as fraud and tax evasion, and are in the final stages of their sentence before release. App. 2a, 14a. Participants are selected after screening by both the Bureau of Prisons and the contractor to determine which eligible inmates

are most likely to become productive members of society. App. 14a. Juveniles, psychotics, those with histories of violent behavior, and those convicted of violent crimes or sex offenses are not accepted into the program. During the day, program participants learn job training skills and receive job counseling within the communities in which they desire to work and live upon completion of their sentence. App. 14a. At night, participants reside in a supervised residential facility. App. 14a.

On April 1, 1985, Bannum was awarded a contract by the Bureau of Prisons to provide a residential community treatment center ("CTC") in Fort Lauderdale, Florida. Bannum used the Areca Palms Motel in Fort Lauderdale for the operation of its CTC. The Areca Palms Motel was a duly licensed and appropriately zoned motel authorized to rent rooms on either a short or long-term basis. The Areca Palms was located in a zoning district of the City which permits by right multi-family residences, apartment houses, motels, hotels, foster homes, mobile home parks, convents, and fraternity and sorority houses. App. 14a. The City of Fort Lauderdale, through its zoning authorities, approved Bannum's use of the leased rooms at the Areca Palms Motel as sleeping quarters for its program participants, without need for obtaining any special licenses or permits, on the condition that Bannum located its administrative and program office facilities elsewhere. App. 14a.

Pursuant to the conditions established by the City, Bannum's program operated without incident or interference by the City until December, 1985, when neighbors and police officers began objecting to ex-offenders sleeping at the Areca Palms Motel. App. 15a. As a result of these complaints, a City police and custom was implemented by the City Commission, police, and City plan-

ners to prevent the increase of such social programs and to sharply limit and control the types of persons participating in them. Upon information and belief, as a result of this public opposition and the desire of the City to reduce the number of such programs in Fort Lauderdale, the City, through its code enforcement board, reversed its previous determination that zoning was proper, and claimed that Bannum's use of the Areca Palms Motel now constituted a "custodial facility" requiring a special use permit under Section 47-11.1 of the City's Code of Ordinances. App. 15a-16a. This "custodial facility" designation existed in April, 1985 when Bannum sought and received licensing of its program at the Areca Palms Motel, and was apparently found by the City not to apply to Bannum's use of the motel. App. 16a-17a. Furthermore, prior to Bannum's use of the Areca Palms Motel, the Salvation Army operated a similar facility in the City without ever having been required to apply for a special use permit.

Subsequently, a unanimous vote of the Board of Adjustment upheld the citation of the Areca Palms Motel as being in violation of the custodial facility ordinance because it housed Bannum's program participants overnight. App. 19a. As a result of the City's actions, the Bureau of Prisons removed residents from the Areca Palms Motel location, and issued a cure notice threatening to default Bannum's contract. App. 19a, 22a. The Bureau of Prisons suspended its contract with Bannum to give it the opportunity to relocate the facility to a site where the City would certify proper zoning.

Bannum located an alternate site for its CYC at 400 S.E. 31st Street, Fort Lauderdale, consisting of an eight-unit apartment complex in a section of the city to which Bannum had been directed by City officials. App. 19a.

Bannum contracted to purchase the property for the residential and administrative functions of the program. App. 14a. Bannum then filed a site plan and an application for the new location with the Planning and Zoning Board in order to obtain the necessary special use permit the City claimed was required. App. 19a, 20a. However, due to its alleged concern for the perception of a disproportionate concentration of social programs in Fort Lauderdale, the City conditioned the issuance of the permit to Bannum on the following conditions: (1) the exclusion of persons from the program who had been diagnosed as having Alzheimers's disease; (2) the exclusion of persons who had been treated at mental institutions within the past five years; (3) the exclusion of persons in need of substance abuse treatment; and (4) the requirement that it provide the City with an ongoing and up-to-date list of all the residents in the program. However, even after imposing these additional requirements, the Planning and Zoning Board voted not to recommend approval of the plan to the City Commission.

The Bureau of Prisons sent another cure notice to Bannum on November 12, 1986, giving it ten days to show that the program was zoned properly, or its contract would be terminated. On November 19, 1986, not having received approval from the City, Bannum filed this action seeking declaratory relief, temporary and permanent injunctive relief to prohibit the City's interference with Bannum's use of the alternate property for its supervised residential program, as well as seeking monetary relief. The district Court denied Bannum's request for a temporary injunction. Soon thereafter, the Fort Lauderdale City Commission, citing its opposition to all further social programs, disapproved Bannum's application for a special use permit for the alternate prop-

erty. App. 22a. The contract was subsequently terminated by the Bureau of Prisons. App. 22a.

REASONS FOR GRANTING THE WRIT

The decisive legal rulings delineated below conflict with the clear principles this Court has established on equal protection challenges. Specifically, the Eleventh Circuit failed to properly consider and apply the second prong of the rational basis test utilized by this Court in equal protection challenges, and it failed to properly consider elements of intentional and purposeful discrimination in Petitioner's "as applied" equal protection challenge.

I.

WAS THE *CITY OF CLEBURNE v. CLEBURNE LIVING CENTER*, 473 U.S. 432, 105 S.CT. 3249 (1985), RATIONAL BASIS TEST IMPROPERLY APPLIED BELOW, WHEN THE ELEVENTH CIRCUIT COURT OF APPEALS FAILED TO PROPERLY APPLY THE SECOND PRONG OF THE RATIONAL BASIS TEST IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF THE CITY OF FORT LAUDERDALE ON BANNUM'S EQUAL PROTECTION CHALLENGE OF SECTION 47-11.1.1(d) OF THE FORT LAUDERDALE CODE OF ORDINANCES?

The Eleventh Circuit incorrectly applied the second prong of the rational basis test described by this Court in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985). Specifically, the Eleventh Circuit failed to properly consider whether the zoning ordinance of the City of Fort Lauderdale was rationally related to the reasons offered by the City as legitimate ends. Despite the evidence offered by Bannum in support of its argument that no rational relationship existed between

the City's ends and its application of the zoning ordinance to Bannum, the Eleventh Circuit relied upon the City's proffered goals of promoting safety for its citizens and the goal of attempting to neutralize its disproportionate accommodation of social service facilities in making its decision. Ultimately, the Eleventh Circuit concluded that the City's proffered reasons for requiring a special use permit were legitimate governmental purposes, and therefore Bannum's equal protection rights were not violated.

As the Eleventh Circuit has already determined, an analysis of this case must involve the analogous case of *Cleburne*. *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 999 n.30 (11th Cir. 1990). In *Cleburne*, this Court clearly stated that a proper analysis is not only whether the City offered a legitimate purpose for its decision to treat Bannum differently than other similarly situated persons, but also whether a rational basis exists to support that the City's requirement of the special use permit furthers this purpose. *See generally Cleburne*. *See also Haves v. Miami*, 52 F.3d 918, 921-924 (11th Cir. 1995).

In *Cleburne*, this Court was faced with an as applied challenge to the requirement of a special use permit. This Court ultimately concluded that the plaintiff's facility was similarly situated to other care and multiple-dwelling facilities, and stated that any perceived differences between the occupants of the group home in question, and those who occupy other facilities in the same zone, were "largely irrelevant unless the . . . home and those who occupy it would threaten legitimate interests of the City in a way that other permitted uses such as boarding houses and hospitals would not." *Cleburne*, 473 U.S. at 448, 105

S.Ct. at 3258. This Court then considered, individually, the following reasons offered by the City as those necessitating the home to obtain a special use permit: the negative attitude of the majority of property owners located within 200 feet of the home; the location of the facility across from a junior high school and on a five-hundred year flood plain; the size of the home and the number of people that would occupy it. After evaluating all of the legitimate bases proffered by the City, this Court concluded that "the record [did] not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests. . ." *Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3258. Ultimately, it was this Court's opinion that the requirement of the special use permit rested upon "irrational prejudice."

In the instant case, the Eleventh Circuit failed to consider the merits of the relationship between the "general welfare" interests offered by the City, namely public safety and conservation of municipal resources, as they applied to its requirement that Bannum obtain a special use permit. Indeed, as the Eleventh Circuit acknowledged, there is "little doubt that these interests qualify as 'legitimate' for purposes of rational basis review." *Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819, 823. However, contrary to what the Eleventh Circuit suggested, the enforcement of section 47-11.1.1(d) with respect to Bannum is not sufficiently related to the above-stated municipal interests.

The Eleventh Circuit stated that "[r]egarding the application of the ordinance to Bannum specifically, it was not irrational for the City to have concerns about whether the ex-offenders housed at the CTC would either pose some threat to the surrounding community or exac-

erbate the City's perceived burden in accommodating a disproportionate share of social service programs." *Bannum*, 157 F.3d 819, 823. As such, the Eleventh Circuit concluded that "the City could reasonably have believed that applying the 'custodial facility' designation to Bannum's CTC would further its interests in conserving municipal resources and protecting the public." *Bannum*, 157 F.3d 819, 823.

The Eleventh Circuit failed to consider, however, that it was not reasonable for the City to believe that applying the "custodial facility" designation to Bannum's CTC would further its interests because of the existence of clear evidence to the contrary. With respect to the City's alleged concerns about public safety, Bannum presented evidence that during the year its CTC was in operation at the Areca Palms Motel, there were no reports of crime directly attributable to any participants of its CTC program. In addition, the owner of the Areca Palms Motel stated that Bannum's program participants were model residents and wished his other tenants were as well-behaved. Furthermore, the City failed to present evidence to the contrary, or that the crime rate in general rose as a result of Bannum's operation of the CTC at the Areca Palms Motel. In fact, for ten years prior to Bannum's contract with the Bureau of Prisons, the Salvation Army ran a similar program in Fort Lauderdale, and there is no record evidence that its participants posed any special safety concerns. Therefore, the enforcement of the zoning ordinance on Bannum could not possibly be rationally related to the City's concerns about public safety. Bannum's CTC offered no more a threat to the public safety than did any of the other similarly situated establishments within the zoned district, yet it was the only one required to apply for a special use permit.

With respect to the City's concern regarding the conservation of municipal resources, the fact that the Salvation Army operated a similar program for several years prior to, and following, Bannum's CTC, is evidence that the City's alleged concerns were contrary to the manner in which it chose to operate. Furthermore, although persons in need of residential social services programs may suffer from mental or physical infirmities not necessarily shared by other persons in the community, the Eleventh Circuit failed to consider how these differences warrant a regulation not applied to other businesses or programs providing housing within the City, i.e. motels, hotels, and apartment houses. The Eleventh Circuit was presented with no evidence that the participants in Bannum's CTC experienced, with greater frequency, physical, psychological, emotional or social problems which would require a disproportionate share of the City's municipal resources.

The Eleventh Circuit failed to consider how the City's enforcement of the zoning ordinance on Bannum was rationally related to its proffered ends in light of the evidence presented by Bannum. Upon careful consideration of this evidence, it is clear that no such rational relationship exists, and that the City's sole reason for enforcement of the zoning regulation on Bannum was irrational fear and prejudice. As such, Bannum respectfully requests this Court grant its Petition for Writ of Certiorari, and consider all of the evidence with respect to the second prong of the rational basis test.

II.

WAS THE *CITY OF CLEBURNE v. CLEBURNE LIVING CENTER*, 473 U.S. 432, 105 S.Ct. 3249 (1985), RATIONAL BASIS TEST IMPROPERLY APPLIED BELOW, WHEN THE ELEVENTH CIRCUIT FAILED TO PROPERLY CONSIDER ELEMENTS OF INTENTIONAL AND PURPOSEFUL DISCRIMINATION IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF THE CITY OF FORT LAUDERDALE ON BANNUM'S "AS APPLIED" EQUAL PROTECTION CHALLENGE OF SECTION 47-11.1.1(d) OF THE FORT LAUDERDALE CODE OF ORDINANCES?

The Equal Protection Clause of the United States Constitution provides that "[s]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3254 (1985) (citing *Plyer v. Doe*, 102 S.Ct. 2382, 2394 (1982)). "The equal protection standard applicable to a claim of unequal application of facially neutral legislation is materially different than that applicable to a challenge to classifications created on the face of the legislation." *Cleburne*, 105 S.Ct. at 3254. In an "as applied" challenge, the plaintiff must show that the defendant treated the plaintiff differently than other persons similarly situated to the plaintiff, and that this disparate treatment arose out of the defendant's intent to discriminate against the plaintiff. *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 n.5 & 1113 (11th Cir. 1987). Intent to discriminate can be inferred from the government's failure to show that its actions were rationally related to a legitimate government purpose, *see Cleburne*, 105 S.Ct. at 3260, or it can be shown by direct or circumstancial evidence, *see E & T Realty v. Strickland*, 830 F.2d 1107, 1114 n.9

(11th Cir. 1987). "Discriminatory purpose" is such that it "implies that the decisionmaker . . . selected . . . a particular cause of action at least in part 'because of' . . . its adverse effects upon an identifiable group." *E & T Realty*, 830 F.2d at 1114, citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

In the instant case, the Eleventh Circuit failed to consider elements of intentional and purposeful discrimination consistent with this Court's decision in *Cleburne*. Specifically, the City of Fort Lauderdale reconsidered its classification of Bannum's CTC, and labeled it a "custodial facility," only after the City became aware of negative attitudes in the community about Bannum's CTC. It wasn't until December of 1985, after receiving complaints from City residents, that the Fort Lauderdale Code Enforcement Board issued the owner of the Areca Palms Motel a notice of violation of Section 47-11.1.1(d) of the Fort Lauderdale Code of Ordinances, which requires a special use permit for the operation of a "custodial facility" within the City. Interestingly, Bannum showed that the City never imposed the requirement of a special use permit on Bannum's operation at the Areca Palms location for almost one year prior. By classifying the Areca Palms in such a manner, and requiring it to apply for a special use permit, the City was then able to impose certain special demands upon Bannum, such as requiring Bannum to provide the police department with the names of all ex-offenders housed at its CTC. Since the Bureau of Prisons would not allow this information to be provided to the police, Bannum lost its contract with the Bureau of Prisons for the operation of a CTC in Fort Lauderdale.

Second, intent to discriminate on the part of the City can be inferred from the government's failure to show that its actions were rationally related to a legitimate government purpose. As discussed more fully hereinabove, the legitimate ends proffered by the City, public safety and conservation of public resources, were not rationally related to the City's requiring Bannum to apply for and obtain a special use permit for its CTC at the Areca Palms Motel. Evidence was offered by Bannum which tended to show that there was no rational basis to believe that its CTC was a threat to public safety, and that operation of its facility would not be a burden on the City's resources and social service programs.

Third, the City's intent to discriminate against Bannum is clearly evidenced by its disparate treatment of facilities that fell under its definition of "special use" facilities. Specifically, as stated hereinabove, and based upon information and belief, the City permitted the Salvation Army to operate a facility, which clearly fell within the City's definition of a "special use" facility, without requiring it to obtain a special use permit. There was no justifiable rationale for the disparate treatment afforded the two facilities by the City in this regard. Therefore the City's requirement that Bannum obtain a special use permit to operate its CTC constitutes intentional discrimination.

Finally, perhaps the most compelling evidence of the City's intent to discriminate against Bannum was the fact that it permitted other similarly situated entities to operate within the City as non-custodial facilities. The Areca Palms Motel was located in a zoning district of the City which permitted, by right, multi-family residences, apartment houses, motels, hotels, foster homes, mobile homes, convents, and fraternity and sorority houses. These

exempted uses, within the zoning district, are similarly situated to Bannum's facility because each houses unrelated individuals at one location. Obviously, none of the other motels located in this zone were required by the City to apply for and be issued a special use permit. However, by suddenly requiring the Areca Palms to obtain a special use permit to operate its facility within a district zoned specifically for motels, the City intentionally discriminated against Bannum and its use of the Areca Palms as a CTC.

It is clear that the City chose to classify the Areca Palms as a "custodial facility" and require a special use permit because of the adverse effects it would have on the ex-offenders being housed there. As stated, Bannum operated its CTC at the Areca Palms for approximately one year prior without the City requiring a special use permit. It was not until it became clear to the City that local residents had negative attitudes about the ex-offenders that it reclassified the Areca Palms. During this same period of time, the City allowed other similarly situated establishments to operate in the district without a special use permit. The Eleventh Circuit failed to adequately consider this evidence of clear discriminatory intent on the part of the City on appeal. As such, Bannum respectfully requests this Court to consider all ements of intentional and purposeful discrimination consistent with its holding in *Cleburne*.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grants its Petition for Writ of Certiorari, and decide this case consistent with its holding in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985).

Respectfully submitted,

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APPENDIX A

[PUBLISH]

[Filed 10/05/98]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4901

D.C. Docket No. 86-6926-CV-kmm

BANNUM, INC., BANNUM PROPERTIES, INC.,
Plaintiffs-Appellants,

versus

CITY OF FORT LAUDERDALE, FLORIDA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 5, 1998)

Before HATCHETT, Chief Judge, BLACK, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

HATCHETT, Chief Judge:

Appellants Bannum, Inc. and Bannum Properties, Inc. filed this action pursuant to 42 U.S.C. § 1983 against appellee, the City of Fort Lauderdale, Florida (the City), alleging equal protection and due process violations in

connection with the City's enactment and enforcement of a zoning ordinance. The district court granted summary judgment in favor of the City, finding that the ordinance at issue was rationally related to the achievement of legitimate state interests. We affirm.

I. FACTS

A detailed account of the events giving rise to this lawsuit may be found in our prior opinion in this case and in the district court's summary judgment order. *See Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 990-95 (11th Cir. 1990); *Bannum, Inc. v. City of Fort Lauderdale*, 996 F. Supp. 1230, 1231-34 (S.D. Fla. 1997). Therefore, we provide only a brief factual overview.

Bannum, Inc. and Bannum Properties, Inc. (collectively Bannum) are Kentucky corporations that work in cooperation with the United States Bureau of Prisons to provide supervised residential programs for ex-offenders. In January 1985, the Bureau of Prisons awarded Bannum a contract to establish a community treatment center (CTC) in Fort Lauderdale, Florida. Generally, the program participants were federal prisoners that had been convicted of nonviolent white collar crimes and were serving the last stages of their sentences before release. The CTC agreed to provide housing and job placement services in an effort to assist the participants in resuming their lives outside of prison as productive members of society.

Bannum filed an application with the City for an occupational use license to operate its center. Bannum also sought to lease rooms at the Areca Palms Motel (Areca Palms) in Fort Lauderdale to house the CTC participants. In April 1985, the City zoning authorities approved Bannum's application for the use license on the condition

that Bannum move its office facilities to a commercial zone and obtain a separate license. Bannum complied, leased rooms at the Areca Palms and commenced operation of its center.

In December 1985, after receiving complaints from City residents, the Fort Lauderdale Code Enforcement Board issued Areca Palms owner Gordon Johnson a notice of violation of Section 47-11.1.1(d) of the Fort Lauderdale Code of Ordinances, which requires a special use permit for the operation of a "custodial facility" within the City.[1] Although the City's code contained the "custodial facility" designation at the time Bannum

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[1] The ordinance provides as follows:

> Whenever . . . any land is proposed to be used for:
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> (a) Homes for the care of the aged, including nursing homes;
>
> (b) Homes or centers for the care, boarding or teaching of children;
>
> (c) Boarding or rooming houses;
>
> (d) Custodial facilities, other than detention facilities, . . . such as emergency shelter care facilities, residential child care facilities, adult congregate living facilities, group homes, residential habilitation centers, drug abuse treatment and educational centers, and other similar uses;
>
> No permit shall be issued and no land shall be used for such purpose until the use . . . has been approved by resolution of the city commission, after a recommendation by the planning and zoning board[,] . . . [which entities] shall . . . consider[ ] . . . the following factors:
>
> (1) Impact on the abutting properties from the proposed facility;
>
> (2) The extent to which the proposed facility will serve existing needs within the community;
>
> (3) Compatibility of the proposed facility with existing land uses in the surrounding neighborhood;
>
> (4) Conformance by the proposed facility with all applicable federal, state, and local laws and regulations.

Fort Lauderdale, Fla., Code §47-11.1.1 (1985).

initially sought and obtained licensing, Bannum did not specifically apply for a special use permit. Faced with threats of daily fines for violating the zoning ordinance, Areca Palms ordered Bannum to vacate the rooms assigned to it. Johnson, however, maintained that the CTC did not constitute a "custodial facility" and appealed the citation to the Board of Adjustments, which held a meeting in February 1986 and denied relief. The following month, while Johnson was in the process of appealing the Board of Adjustments' decision to the Circuit Court of Broward County, the Bureau of Prisons removed the CTC participants from Areca Palms.

Bannum worked with city officials during the next seven months to locate an alternate site to house the CTC participants. Upon finding a suitable location, Bannum filed an application with the Planning and Zoning Board to secure a special use permit to operate the CTC at the alternate site. At a hearing in October 1986, the Planning and Zoning Board informed Bannum that it would not issue a special use permit unless Bannum provided the police department with the names and status of the ex-offenders that would be housed at the center. The Bureau of Prisons would not authorize Bannum to disclose such information, and the Planning and Zoning Board eventually recommended the denial of Bannum's application.

In response to Bannum's subsequent submission of a revised application for a special use permit, the City Commission sent Bannum a letter expressing its opinion that "the City has accommodated a disproportionate share of social service facilities[.]" The letter also stated the reasons that the City decided to condition Bannum's receipt of a special use permit upon Bannum's providing information about the CTC participants: essentially, the City

wanted the right to "reject" proposed participants "based upon legitimate concerns for community safety." The letter also stated some apprehensiveness regarding the possibility that Bannum's center may house participants that had been "involved with control[led] substances" or "diagnoses as psychotics[.]" Ultimately, Bannum lost its contract with the Bureau of Prisons due to its failure to obtain the required zoning permit to operate the CTC.

PROCEDURAL HISTORY

Bannum commenced this action against numerous defendants, including the City and other city administrative boards and officials. The complaint alleged violations of 42 U.S.C. §§1981, 1983 and 1985, as well as Article VI and the Fifth and Fourteenth Amendments to the United States Constitution. The defendants moved to dismiss the action, arguing that they were entitled to absolute, qualified and municipal immunity. Treating the motion to dismiss as one for summary judgment, the district court granted the motion as to all defendants. Bannum appealed the immunity ruling as to the City only, and this court vacated that portion of the district court's judgment. *Bannum*, 901 F.2d 989 (11th Cir. 1990). On remand, after further discovery, Bannum and the City filed cross motions for summary judgment on Bannum's constitutional claims. The district court granted summary judgment in favor of the City, and this appealed followed.

II. ISSUE AND STANDARD OF REVIEW

The issue presented in this appeal is whether section 47-11.1.1(d) of the Fort Lauderdale Code of Ordinances, either as written or as applied, violated Bannum's constitutional rights to equal protection or due process of law.

We review the district court's summary judgment ruling *de novo*, applying the same legal standard that the district court employed in the first instance. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918-19 (11th Cir. 1993).

III. DISCUSSION

A. The Rational Basis Test

Section 47-1.1.1(d) of the Fort Lauderdale Code of Ordinances neither targets a protected class nor implicates fundamental rights. Accordingly, we apply the rational basis test to Bannum's equal protection and due process claims.[2] *See Georgia Manufactured Hous. Ass'n. Inc. v. Spalding County, Georgia*, No. 97-8207, slip op. at 3721 (11th Cir. Aug. 6, 1998). In short, the City must prevail if section 47-11.1.1(d) is rationally related to the achievement of some legitimate government purpose. *Georgia Manufactured Hous. Ass'n*, slip op. at 3721.

Under rational basis review, our inquiry is twofold. First, we must "identify[ ] a legitimate government purpose – a goal – which the enacting government body *could* have been pursuing." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995). For purposes of Bannum's case, it is particularly significant that "[t]he *actual* motivations of the enacting governmental body are entirely irrelevant." *Haves*, 52 F.3d at 921.[3] Second, we

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[2] "[T]he rational basis inquiry is the same for equal protection and substantive due process challenges to zoning." Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 n.6 (11th Cir. 1995).

[3] In an apparent effort to unveil what it believes to be the City's improper motivation, Bannum places great emphasis on the fact that the City initially allowed the CTC to operate for nearly

[footnote continued]

must "ask[ ] whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose." *Haves*, 52 F.3d at 922. Thus, section 47-11.1.1(d) survives rational basis scrutiny "[a]s long as [the] reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational[.]" *Haves*, 52 F.3d at 922 (internal quotation and citation omitted).

B. Bannum's Constitutional Claims

Bannum contends that section 47.11.1.1(d) is unconstitutional as applied because negative attitudes and irrational fears about the CTC participants motivated the City's decision to enforce the "custodial facility" provision. Bannum also contends that the ordinance is unconstitutional on its face because it arbitrarily singles out social service programs for differential treatment, requiring that they obtain a special use permit in order to operate, while declining to impose such a burden on other similar uses of property – such as multi-family residences, apartment houses, motels, hotels, foster homes, mobile home parks, convents and fraternity houses.

With respect to the first prong of the rational basis test, the City advances several "legitimate state interests" that it claims to have been pursuing in enacting sec-

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one year before deciding to cite Areca Palms with the "custodial facility" zoning violation. Because the governing body's motive is irrelevant for purposes of rational basis review, we are not at liberty to attach any legal significance to the timing of the City's decision to enforce its zoning ordinance in this case.

tion 47-11.1.1(d), and in requiring Bannum to obtain a special use permit to operate its CTC. These "general welfare" interests include public safety and conservation of municipal resources. We have little doubt that these interests qualify as "legitimate" for purposes of rational basis review. *See Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1387 (11th Cir. 1993) (approving of "safety" and "effect on city services" as permissible bases for imposing land use restrictions), *cert. denied,* 511 U.S. 1018 (1994); *see also Bannum, Inc. v. City of St. Charles,* 2 F.3d 267, 271 (8th Cir. 1993) (approving of overall "public welfare" as legitimate rationale to support municipal zoning scheme under facts similar to the present case).

We also conclude that the second prong of the rational basis test is satisfied, as the enactment and enforcement of section 47-11.1.1(d) is sufficiently related to the above-stated municipal interests. Generally, the City's decision to require certain social service programs to obtain special approval was not arbitrary. Rather, this decision could have been premised upon differences in the ways in which such facilities would operate in comparison to other types of land uses that are not subject to the restriction. Enacting the ordinance enabled the City to control the placement of certain social service programs, thereby furthering the City's goals. Regarding the application of the ordinance to Bannum specifically, it was not irrational for the City to have concerns about whether the ex-offenders housed at the CTC would either pose some threat to the surrounding community or exacerbate the City's perceived burden in accommodating a disproportionate share of social service programs. Thus, the City could reasonably have believed that applying the "custodial facility" designation to Ban-

num's CTC would further its interests in conserving municipal resources and protecting the public.

The Supreme Court's decision in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), upon which Bannum primarily relies, does not undermine our conclusion that section 47-11.1.1(d) survives rational basis scrutiny. In *Cleburne*, the Court held that a city requiring a special use permit for the operation of a group home for the mentally retarded violated the Equal Protection Clause, as applied to the facts of that case, because the requirement "appear[ed] . . . to rest on an irrational prejudice against the mentally retarded[.]" *Cleburne*, 473 U.S. at 450. The Court stated that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Cleburne*, 473 U.S. at 448.

We assume, but need not decide, that under *Cleburne*, the City's attempt to respond to the community's "negative attitudes" toward the CTC participants was an illegitimate governmental purposes, thus failing the first prong of our rational basis inquiry.[4] Nevertheless, the City must still prevail since such community input was not the *sole* reason for the City's actions. Although Bannum presented evidence tending to indicate that the community's "negative attitudes" may have influenced the City's decision to some degree, the City also had at least two legitimate municipal interests – conservation of resources and public safety – that it could have sought to further

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[4] *But see Corn*, 997 F.2d at 1387 ("Merely because citizen input may not be a sufficient basis for a rational government land use decision in every instance does not mean it can never be a sufficient basis for such a decision. In most cases it will be.").

through its enforcement of the ordinance. *See Haves*, 52 F.3d at 923 ("As long as the City can present at least one plausible, arguably legitimate purpose for the Ordinance, summary judgment for the City is appropriate unless the Appellants can demonstrate that the legislature could not possibly have relied on that purpose."); *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it[.]") (internal quotation and citations omitted). As discussed above, requiring Bannum to obtain a special use permit was rationally related to the City's legitimate municipal interests.

IV. CONCLUSION

In closing, we note that Bannum presented some evidence that its CTC participants posed no *actual* threat to the Fort Lauderdale community. Unfortunately for Bannum, however, controlling precedent limits our inquiry to whether the City *could rationally have believed* that the CTC participants posed a threat to either public safety or municipal resources.[5] Although we remain somewhat concerned about the manner in which the City handled the zoning of Bannum's CTC, we simply cannot conclude that the City's purported motives were entirely devoid of rationality. Accordingly, we must uphold the zoning ordinance – both on

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[5] *See, e.g., Beach Communications*, 508 U.S. at 315 (noting that "a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data").

its face and as applied to Bannum – and affirm the district court's summary judgment ruling in favor of the City.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5022

BANNUM, INC. and Bannum Properties, Inc.,
Plaintiffs-Appellants,

v.

CITY OF FORT LAUDERDALE, et al.,
Defendants-Appellees.

May 21, 1990

As Amended May 24, 1990

Operator of supervised residential program for ex-offenders brought suit requesting declaratory judgment and injunctive relief after approval of the program was withdrawn and operator was unable to relocate the program. The United States District Court for the Southern District of Florida, No. 86-6926-CIV-EPS, Eugene P. Spellman, J., granted summary judgment to all defendants on basis of absolute, qualified and municipal immunity, and operator appealed. The Court of Appeals, Fay, Circuit Judge, held that city acted under color of law, as required to establish prima facie case under §1983, in abrogating occupational license previously issued for the program and in prohibiting continued use of motel property for housing program participants.

Affirmed in part, vacated in part and remanded.

Scott T. Wendelsdorf, Ogden & Robertson, Louisville, Ky., George K. Rahdert, Rahdert & Anderson, Randee K. Carson, St. Petersburg, Fla., for plaintiffs-appellants.

Robert H. Schwartz, Gunther & Whitaker, P.A., Ft. Lauderdale, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and EDMONDSON, Circuit Judges, and HALTOM*, District Judge.

FAY, Circuit Judge:

This case involves the significant concern for placing formerly incarcerated individuals back into communities, where they may earn a living and resume their lives outside of prison. Plaintiff-appellant Bannum, Inc. (Bannum) operated a supervised residential program for ex-offenders in Fort Lauderdale, Florida. Although the Fort Lauderdale zoning authorities initially approved Bannum's operation, this approval subsequently was withdrawn, and Bannum was unable to relocate its supervised residential program in Fort Lauderdale. Requesting a declaratory judgment and injunctive relief, Bannum brought this action against the City of Fort Lauderdale and various city administrative boards and officials. The district court granted summary judgment to all defendants on the bases of absolute, qualified and municipal immunity. While we affirm the district court's granting summary judgment to the administrative and individual defendants, we vacate judgment as to the City of Fort Lauderdale and remand for consideration of constitutional issues and pendent state claims that have not been addressed.

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*Honorable E.B. Halton, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

I. FACTUAL BACKGROUND

The Bannum plaintiffs-appellants, Kentucky corporations authorized to transact business in Florida, provide supervised residential programs nationally for ex-offenders in conjunction with the United States Bureau of Prisons. Program participants, convicted felons of non-violent crimes, have been incarcerated and are in the last stage of their sentence before release.[1] Participants are selected after screening in order to determine which eligible inmates appear likely to become productive members of society. During the day, the ex-offenders learn job-training skills and receive job counseling within the communities in which they desire to work and live upon completion of their sentence. At night, they reside in a specified, supervised residential facility.

In April, 1985, the Fort Lauderdale zoning authorities approved Bannum's use of leased rooms at the Areca Palms Motel, 905 N.E. 18th Avenue in Fort Lauderdale for its ex-offender, supervised residential program. The decision to issue an occupational license is based upon a description of the activities conducted on the subject premises as well as a determination that the zoning is proper.[2] The Areca Palms Motel is located in a zoning district which permits multi-family residences, apartment houses, motels, hotels, foster homes, mobile home parks, convents, fraternity and sorority houses. Fort Lauderdale, Fla., Code §47-11.1 (1985). The zoning authorities insisted that Bannum locate its office elsewhere and obtain a license for that office. Bannum located its business office at 1776 East Sunrise Boulevard in Fort

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[1] Essentially, the participants in Bannum's program have been convicted of white-collar crimes, such as fraud and tax evasion.

[2] Deposition of Janice W. Mink at 12-13. Supp. R1-70.

Lauderdale. Thereafter, the requisite city and county licenses were issued, and Bannum commenced operation of its ex-offender, supervised residential program at the Areca Palms Motel pursuant to a contract with the United States Bureau of Prisons.

Bannum's program participants used the motel only for overnight housing and engaged in their work-related activities during the day. Edward Reilly, manager of the Areca Palms Motel during 1985 through 1986 when Bannum operated its program there, testified by affidavit that the program participants used the motel as did the other guests.[3] He stated that the program participants were not restrained or held in custody and that he neither encountered any disturbance, vandalism or any problems whatsoever from them nor received any complaints of disorderly, abusive, threatening or unlawful conduct during their residence.[4] Reilly described the Bannum participants as motel residents and stated that he "wished that all the motel's guests were as well-behaved and quiet as were the Bannum participants."[5]

Although Bannum's program had operated without incident or interference from the city, by December, 1985, with knowledge of the existence of the program in their community, neighbors and police officers objected to the housing of ex-offenders at the Areca Palms Motel.[6] Subsequently, the city reversed its previous determination that zoning was proper and decided that Bannum's use of the Areca Palms Motel as residential housing for

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[3] Affidavit of Edward Reilly. R1-73-1.

[4] Id. at 2.

[5] Id.

[6] Affidavits of David A. Lowry. Supp. R1-64-3-5, 30; Newspaper articles. Supp. R1-64-45-46.

its program participants constituted a "custodial facility" requiring a special use permit under section 47-11.1.1(d) of the Fort Lauderdale Code of Ordinances.[7] Significantly, the "custodial facility" designation existed in the Fort Lauderdale Code of Ordinances in April, 1985, when Bannum sought and received licensing by the city

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[7] The Fort Lauderdale Code of Ordinances, requiring special use permits for particular land uses, provides with regard to "custodial facilities" as follows:

> Whenever application is made for a building permit to erect or enlarge any building, or any land is proposed to be used for:
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> . . . .
>
> (d) Custodial facilities, other than detention facilities, licensed by the State of Florida Department of Health and Rehabilitative Services or other governmental agency having jurisdiction over the facility, such as emergency shelter care facilities, residential child care facilities, adult congregate living facilities, group homes, residential habilitation centers, drug abuse treatment and education centers, and other similar uses;
>
> no permit shall be issued and no land shall be used for such purpose until the use of such site for such purpose has been approved by resolution of the city commission, after a recommendation by the planning and zoning board. The actions of both the planning and zoning board and the city commission shall be based upon consideration of the following factors:
>
> (1) Impact on the abutting properties from the proposed facility;
>
> (2) The extent to which the proposed facility will serve existing needs within the community;
>
> (3) Compatibility of the proposed facility with existing land uses in the surrounding neighborhood;
>
> (4) Conformance by the proposed facility with all applicable federal, state and local laws and regulations.

Fort Lauderdale, Fla., Code §47-11.1.1 (1985).

for its program at the Areca Palms Motel.[8] The term "custodial facility" is not defined in the Fort Lauderdale Code of Ordinances.[9]

Although Bannum held occupational licenses to conduct its supervised residential program at the Areca Palms Motel, the Fort Lauderdale Enforcement Board cited the motel owner, Gordon Johnson, with a notice of violation and threatened to impose fines of $250.00 per day until he evicted Bannum and the residing program participants.[10] Areca Palms Motel manager Reilly by affidavit stated that city officials told him that he must remove Bannum, ending the matter, or incur the daily fine.[11] Following the threat of a fine, Reilly ordered Bannum to vacate the rooms assigned to it on December 19, 1985.[12]

Motel owner Johnson appealed the decision of the Code Enforcement Board to the Board of Adjustment, the city's highest policymaking body regarding zoning. The appeal was heard by the Fort Lauderdale Board of Adjustment on February 12, 1986.[13] Witnesses dis-

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[8]See Affidavits of David A. Lowry. Supp. R1-64-1, 3, 29-31; Affidavit of Arnold R. Rich. Supp. R1-64-9-10; Affidavit of Paul Troutman. Supp. R1-64-20; Affidavit of Marvin R. O'Koon. Supp. R1-64-27; Memorandum from Paul Troutman to Ft. Lauderdale CTC File. Supp. R1-64-63-64; Deposition of Major Edgar Thomas White at 4-9. Supp. R1-70; Deposition of Chief Joseph C. Gerwens at 22-23. Supp. R1-70.

[9]Deposition of Janice W. Mink at 7. Supp. R1-70.

[10]City of Fort Lauderdale Code Enforcement Board Notice of Violation and Notice to Quit and Vacate to Bannum (Dec. 19, 1985). Supp. R1-64-58-59; Affidavit of David A. Lowry. Supp. R1-64-4-5; Affidavit of Paul A. Troutman. Supp. R1-64-25.

[11]Affidavit of Edward Reilly. R1-73-2.

[12]Id.

[13]Minutes of the Fort Lauderdale Board of Adjustment Meeting (Feb. 12, 1986). Supp. R1-64-65-76.

cussed various aspects of Bannum's voluntary, supervised residential program. Participants had to be in their rooms by midnight, signified by a punch card. Lody Leslie, supervisor of Bannum's program, explained that counseling occurred at the Bannum business office and that the program participants merely spent the night at the motel, where there were no guards or custodians. Frank Paglimanite, the Fort Lauderdale code compliance inspector who investigated the premises and determined that the Areca Palms Motel violated the city ordinance because it was a custodial facility, stated that he considered a curfew equivalent to detention. He conceded, however, that he had not cited motels, housing visiting football teams with 11:00 P.M. curfews, as being custodial facilities. "[I]t was just a particular type of custodial facility which offended his sensibility as the inspector."[14]

Furthermore, a Fort Lauderdale police sergeant, who inspected the motel premises on three occasions for compliance with local and state license permits, reported that he could not identify participants in Bannum's program as prisoners. His rather unique definition of custodial facility was responsibility to someone, rules or morals and not physical restraint. Residents in the vicinity of the Areca Palms Motel opposed housing convicts at the motel because of concerns regarding an increase in crime and a decease in the quality of their neighborhood life. While there had been four stolen cars and vandalism in the area since Bannum's program had been in operation, no evidence was given that program participants were involved. Nearby condominium owners considered that the use of the Areca Palms Motel for ex-offenders would have a depreciating effect on the property

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[14] Id. at 70-71.

values of their condominiums, although no supporting evidence was offered. An area resident complained that housing convicts at the motel would give unsuspecting tourists a negative attitude toward Fort Lauderdale. A unanimous vote of the Board of Adjustment upheld the citation of the Areca Palms Motel as being in violation of the custodial facility ordinance because it housed Bannum's program participants.

Motel owner Johnson appealed the decision of the Board of Adjustment to the Broward Circuit Court. The Code Enforcement Board approved the agreement between the City of Fort Lauderdale and Johnson that no fine would be levied on the property until thirty days after a judicial ruling. Bannum, however, already had vacated the Areca Palms Motel. Subsequently, the motel owner's appeal was dismissed, and no fines were imposed by the city.

Because of the contention of the City of Fort Lauderdale that Bannum was operating its program in an improper zone and the enforcement actions against Bannum and the motel owner, the Bureau of Prisons removed residents from the Areca Palms Motel on March 5, 1986.[15] In an effort to continue operations and to protect its contract with the Bureau of Prisons, Bannum, working with city officials, located an alternate site at 400 S.E. 31st Street, an eight-unit apartment complex in Fort Lauderdale.[16] Plaintiff-appellant Bannum Properties,

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[15] Affidavit of David A. Lowry. Supp. R1-64-6.

[16] After consultation with various Fort Lauderdale officials, including city attorneys and city planner Mink, Bannum's general counsel was directed to consider a site in the southwest corner of the city, the Old Federal Highway District. Affidavit of Marvin R. O'Koon. Supp. R1-64-11. City planner Mink informed the general counsel that the New Federal Highway would segregate that section of the city and "that no one cared about it." Id.

Inc. contracted to purchase this property for the purpose of leasing apartments to Bannum for the residential and administrative functions of its program.[17] Bannum filed a site plan and an application for the new location with the Planning and Zoning Board in order to obtain the requisite special use permit.[18]

On October 9, 1986, the staff of the Planning and Zoning Board recommended approval of the plan subject to conditions outside of the zoning regulations.[19] Bannum's general counsel appeared before the Planning and Zoning Board on October 15, 1986, where he encountered concern for the perception of a disproportionate concentration of social programs in Fort Lauderdale and reluctance to grant approval without imposing additional conditions other than the zoning requirements.[20] The conditions included exclusion of persons from the program who had been disgnosed as having Alzheimer's disease, persons who had been treated at mental institutions within the past five years, and requiring Bannum to provide to the

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[17] Affidavit of David A. Lowry. Supp. R1-64-6; Affidavit of Marvin R. O'Koon. Supp. R1-64-12.

[18] Id.; City of Fort Lauderdale Planning and Zoning Board, Application for Approval of Development Plan. Supp. R1-64-92-95.

[19] Affidavit of Davia A. Lowry. Supp. R1-64-4; Affidavit of Marvin R. O'Koon. Supp. R1-64-12.

[20] Affidavit of David A. Lowry. Supp. R1-64-6-7; Affidavit of Marvin R. O'Koon. Supp. R1-64-12; see Affidavit of Paul A. Troutman. Supp. R1-64-22; Newspaper articles. Supp. R1-64-37-43; Memorandum from Captain Edgar T. White to Janice Mink. Supp. R1-64-82; Memorandum from J.C. Gerwens to Janice Mink. Supp. R1-64-83; Letter from Thomas J. Ansbro, Jr. to Marvin R. O'Koon. Supp. R1-64-84-85; Deposition of Major Edgar Thomas White at 10-13, 18, 20. Supp. R1-70; Deposition of Chief Joseph C. Gerwens at 9-17, 19-21, Exs. 1-3. Supp. R1-70; Deposition of Janice W. Mink at 39-40, 45-48. Supp. R1-70.

Fort Lauderdale police a daily listing of the residents in the program.[21] Even after imposing the additional conditions, the Planning and Zoning Board voted not to recommend approval of the plan to the city commission. In a subsequent letter, deputy city attorney Thomas J. Ansbro, Jr. explained to Bannum's general counsel Marvin R. O'Koon the concern of the city commission for the perceived disproportionate concentration of social service programs in Fort Lauderdale:

> As I mentioned to you recently, as a general proposition, the City Commission has expressed the opinion that the City has accommodated a disproportionate share of social service facilities, compared to other cities and areas in Broward County. This opinion has been re-confirmed by the Deputy Chief of Police. . . .

Letter from Thomas J. Ansbro to Marvin R. O'Koon (Oct. 24, 1986). Supp. R1 – 64-84.

Following this negative vote and letter, Bannum's general counsel met with the Fort Lauderdale deputy city attorney, city planner Mink and Larry McSwain, community programs manager for the Federal Bureau of Prisons, in an attempt to resolve the city's problems concerning Bannum's operation of its supervised residential program at the new location.[22] Discussion revealed that the only significant problem was the requirement that the police department be given a daily list of program residents.[23] Upon contacting the Bureau of Prisons regarding this concern, Bannum's general counsel and

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[21] Affidavit of David A. Lowry. Supp. R1-64-6; Affidavit of Marvin R. O'Koon. Supp. R1-64-12.

[22] Affidavit of Marvin R. O'Koon. Supp. R1-64-13.

[23] Id.

McSwain were informed that prison policy would not allow the release of the identities of program participants. Subsequently, Bannum's general counsel received a letter from the Fort Lauderdale deputy city attorney stating his belief that the city wanted the right to reject a proposed program participant based on legitimate concerns for community safety.[24]

On November 10, 1986, Bannum received from the Bureau of Prisons a cure notice according it ten days in which to show that its program was zoned properly or its contract would be terminated.[25] The Fort Lauderdale city commission declined to place Bannum's request for conducting its supervised residential program on the agenda for its meeting on November 18, 1986.[26] The delay by the city commission extended their decision beyond the date for Bannum to obtain approval by the Bureau of Prisons. On November 19, 1986, the Bannum plaintiffs filed their complaint seeking declaratory judgment, temporary and permanent injunctive relief to prohibit the city's interference with Bannum's use of the 400 S.E. 31st Street property for its supervised residential program, and requested monetary damages.

Following denial of injunctive relief by the district court, the Fort Lauderdale city commission disapproved Bannum's application for a special use permit for the 400 S.E. 31st Street location. Thereafter, the Bureau of Prisons cancelled Bannum's contract for Fort Lauderdale. During the pendency of this litigation, the City of Fort

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[24] Letter from Thomas J. Ansbro, Jr. to Marvin R. O'Koon (Oct. 24, 1986). Supp. R1-64-84.

[25] Affidavit of Marvin R. O'Koon. Supp. R1-64-13-14.

[26] Id. at 13.

Lauderdale enacted an ordinance placing a moratorium on "the whole generic term of social service, residential facilities."[27]

II. PRIOR PROCEDURE

The Bannum plaintiffs' complaint alleges violations of 42 U.S.C. sections 1981, 1983 and 1985 as well as Article VI and the Fifth and Fourteenth Amendments to the United States Constitution, and bases jurisdiction on 28 U.S.C. sections 1331, 1332, 1343(a)(3) and 1343(a)(4). Initially requesting a temporary restraining order, the Bannum plaintiffs subsequently moved for a preliminary injunction and provided the district court with additional documentation. The district court denied Bannum's motion for preliminary injunction without considering the merits of the case because it determined that plaintiffs failed to meet the prerequisites for preliminary injunctive relief. Bannum, Inc. v. City of Fort Lauderdale, 657 F.Supp. 735 (S.D. Fla. 1986). The district court, however, did indicate its reaction to Bannum's constitutional equal protection contention at that early stage of the proceedings:

> Indeed, although the ex-offender status of the residents may be an objectionable category for equal proection purposes, it may also be the case that the Defendants will be able to show that the zoning restriction is rationally based, and that the citizens of the City of Fort Lauderdale have a legitimate interest in keeping partially incarcerated persons off neighborhood streets.

Id. at 738.

Defendants moved to dismiss the action and included among their grounds for dismissal, legislative or absolute

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[27] Deposition of Janice W. Mink at 48. Supp. R1-70.

immunity as to the local official defendants, qualified immunity as to the local governmental officials charged with discretionary responsibilities, and municipal immunity as to the municipality, its boards, agencies and supervisory personnel. No answer to plaintiffs' complaint has been filed by any of the defendants. After receiving the plaintiffs' response, the district court issued an order to show cause why the motion to dismiss should not be granted. The court instructed: "Specifically, Plaintiff shall offer factual proof that Defendants were not acting in a legislative role or that Defendants were not acting within the scope of their discretionary authority. See Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982) [, cert. denied, 460 U.S. 1039, 103 S.Ct. 1431, 75 L.Ed.2d 791 (1983)]." R1-63. In response, plaintiffs filed an extensive compliance appendix.

Following review of plaintiffs' response to the show cause order, the district court advised the parties that it would consider the motion to dismiss as a motion for summary judgment:

> On the face of the pleadings heretofore filed, it appears that the Defendants were acting within the legitimate scope of their legislative authority. This Court is mindful of the fact that Plaintiff voluntarily relinquished its right to conduct discovery prior to the resolution of Defendant's Motion to Dismiss. Moreover, the Court acknowledges that the scope of legislative immunity is fact-intensive and would more properly be resolved under the factual standard of a Motion for Summary Judgment. Accordingly, it is hereby
>
> ORDERED AND ADJUDGED that this Motion will be treated as a Motion for Summary Judgment as to the issue of immunity. The parties shall have 45 days from the date of this Order during which to

> conduct expedited discovery solely regarding the applicability of vel non of legislative immunity to the Defendants in this cause. The parties shall submit memoranda addressing the legal theories at issue and shall direct the Court's attention to specific admissible evidence tending to establish or negate the existence of a genuine, material issue of fact as to the applicability of immunity under the facts of this cause.

R1-66-1-2 (footnote omitted). Plaintiffs responded to defendants' motion to dismiss, converted by the court into a summary judgment motion. Thereafter, the district court granted summary judgment to all defendants on the bases of absolute, qualified and municipal immunity, and entered final judgment. R1-74, 75.

On appeal, plaintiffs-appellants pursue the district court's granting summary judgment to the City of Fort Lauderdale only and do not question summary judgment as to the municipal governing bodies and individual defendant officials. Plaintiffs-appellants raise two issues on appeal. First, they contend that, through affidavits, depositions and exhibits, they showed or created a reasonable inference that the city, acting through its planning and zoning board, city commission and police department, arbitrarily and unconstitutionally enforced zoning ordinances against Bannum in violation of 42 U.S.C. section 1983. Second, plaintiffs-appellants complain that the district court erred in granting summary judgment as to their non-section 1983 claims. Furthermore, plaintiffs-appellants note that the district court allowed discovery on the narrow issue of legislative immunity solely and that full development of the facts underlying Bannum's claims as to the City of Fort Lauderdale will require additional discovery. Defendant-appellee the City of Fort Lauderdale has contended on

appeal that this case is moot because the Fort Lauderdale Code of Ordinances has been amended to delete the custodial facility category. Fort Lauderdale, Fla., Code § 47-11.1.1. (1989).

III. ANALYSIS

A. Standard of Review

Our review of the district court's grant of summary judgment is plenary, and we apply the same legal standards. Barfield v. Brierton, 883 F.2d 923, 933 (11th Cir. 1989); Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1021-22 (11th Cir. 1988). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Once a summary judgment motion has been made properly by demonstrating the absence of genuine issues of material fact, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Celotex, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)).

Corresponding to directed verdict analysis, a factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); see Everett v. Napper, 833 F.3d 1507, 1510 (11th Cir.

1986); Dominick v. Dixie Nat'l Life Ins. Co., 809 F.2d 1559, 1572 (11th Cir. 1987). "[T]he substantive law will identify which facts are material;" the district court must consider the evidence under the substantive evidentiary burden. Anderson, 477 U.S. at 248, 254, 106 S.Ct. at 2510, 2513. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255, 106 S.Ct. at 2513; Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970); Augusta Iron & Steel Works, Inc. v. Employers Ins. of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). (per curiam); Everett, 833 F.2d at 1510. If more than one inference could be construed from the facts by a reasonable fact finder, and that inference introduces a genuine issue of material fact, then the district court should not grant summary judgment. Barfield, 883 F.2d at 933-34; Samples ex rel. Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). Accordingly, we must determine if genuine issues of material fact exist in this case after examining the governing substantive law. Anderson, 477 U.S. at 250, 106 S.Ct. at 2511; Everett, 833 F.2d at 1510.

B. The Grant of Summary Judgment as to Municipal Liability under Section 1983

In order to prevail in a civil rights action under section 1983, "a plaintiff must make a prima facie showing of two elements: (1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of

law."[28] Dollar v. Haralson County, 704 F.2d 1540, 1542-43 (11th Cir.), cert. denied, 464 U.S. 963, 104 S.Ct. 399, 78 L.Ed.2d 341 (1983); Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); Barfield, 883 F.2d at 934; Everett, 833 F.2d at 1510. While it is not a source of substantive rights, section 1983 provides a method for vindicating federal rights conferred by the Constitution and federal statutes. Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S.Ct. 2689, 2694 n.3, 61 L.Ed.2d 433 (1979); Barfield, 883 F.2d at 934. We have concluded that the district court misinterpreted the municipal liablity under the second element of a section 1983, prima facie case and erred in not progressing to consideration of the alleged constitutional violations comprising the first element of a prima facie case.

Although no answer had been filed by the City of Fort Lauderdale and discovery was limited to the issue of qualified immunity, the district court granted summary judgment to the City of Fort Lauderdale because it concluded that the facts revealed only respondeat superior liability against the city, and did not address the constitutional merits of the case. The Supreme Court has held that municipalities are persons to whom section 1983 applies.

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[28] Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983 (1982).

Monell v. Dept. of Social Servs., 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978). With respect to civil rights violations, municipalities are not entitled to absolute or qualified immunity. Owen v. City of Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980); Monell, 436 U.S. at 701, 98 S.Ct. at 2041.

Under section 1983, local governments can be sued directly for monetary, declaratory or injunctive relief, when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" and when constitutional deprivations result from "governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell, 436 U.S. at 690-91, 98 S.Ct. at 2035-36. A municipality, however, cannot incur liability in a section 1983 action on a respondeat superior theory merely because it employs a tortfeasor. Monell, 436 U.S. at 691, 98 S.Ct. at 2036. The Supreme Court has clarified and reiterated the guiding principles for determining when a single decision may be sufficient to establish unconstitutional municipal policy under section 1983:

> (1) Municipalities have section 1983 liability only for acts officially sanctioned or ordered by the municipality.
>
> (2) Only those municipal officials who have " 'final policymaking authority' " may subject the municipality to section 1983 liability for their actions.
>
> (3) The determination of whether or not a particular official has " 'final policymaking authority' " is governed by state law, including valid local ordinances and regulations.

(4) The challenged action must have been taken pursuant to a policy adopted by the official or officials responsible for making policy in that particular area of the city's business, as determined by state law.

City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 125, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988) (plurality opinion) (citing and quoting Pembaur v. City of Cincinnari, 475 U.S. 469, 480-83, 106 S.Ct. 1292, 1298-1300, 89 L.Ed.2d 452 (1986) (plurality opinion)); see, e.g., Arnold v. Bd. of Educ., 880 F.2d 305, 316 (11th Cir. 1989); Messick v. Leavins, 811 F.2d 1439, 1443 (11th Cir. 1987).

" '[T]he identification of policymaking officials . . . is not a question of fact in the usual sense' and thus not a suitable matter for the jury to decide." Owens v. Fulton County, 877 F.2d 947, 950 (11th Cir. 1989) (per curiam) (quoting Praprotnik, 485 U.S. at 124, 108 S.Ct. at 924). Using as an example the municipal legislative body, the Court has explained that "[n]o one has ever doubted, for instance, that a municipality may be liable under §1983 for a single decision by its properly constituted legislative body – whether or not that body had taken similar action in the past or intended to do so in the future – because even a single decision by such a body unquestionably constitutes an act of official government policy." Pembaur, 475 U.S. at 480, 106 S.Ct. at 1298 (citing Owen, 445 U.S. 622, 100 S.Ct. 1398; City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (Both cases involve actions by city councils.)). In Praprotnik, the Court discussed situations where the municipal policymaker delegates policymaking authority. Praprotnik, 485 U.S. at 126-27, 108 S.Ct. at 925; see Parker v. Williams, 862 F.2d 1471, 1478 (11th Cir. 1989). Recogniz-

ing that "a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law,' " the Court made clear that municipal policymakers cannot evade liability for unconstitutional acts by delegation. Praprotnik, 485 U.S. at 127, 108 S.Ct. at 926 (quoting Adickes, 398 U.S. at 167-68, 90 S.Ct. at 1613-14). Furthermore, "the authority to make municipal policy is necessarily the authority to make final policy." Praprotnik, 485 U.S. at 127, 108 S.Ct. at 926 (emphasis in original). Therefore, ratification by the authorized policymakers of a subordinate's reasoning and decision is "chargeable to the municipality because their decision is final."[29] Id.

Guided by these principles, we analyze the facts in this case. Bannum has challenged a Fort Lauderdale ordinance requiring it to acquire a special use permit to operate its supervised residential program as a custodial facility. Although Fort Lauderdale originally granted Bannum an occupational license for its program and there has been no evidence of any misconduct from any of the program participants at the Areca Palms Motel, the city

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[29] Further explicating ratified subordinate policymaking, the Court stated:

> It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower ranking official.

Praprotnik, 485 U.S. at 130, 108 S.Ct. at 927 (citation omitted).

through its Code Enforcement Board officially changed its position and declared that the motel housing of Bannum's program participants was a custodial facility and inappropriate for the particular zone without a special use permit. The decision of the Code Enforcement Board was appealed to the highest city policymaking body with regard to zoning code interpretation, the Board of Adjustment, which affirmed the decision of the Code Enforcement Board. Accordingly, the decision to abrogate the previously issued occupational license and to prohibit Bannum's continued use of the motel property for housing its community treatment program participants became an official city decision. Bannum's efforts to operate at an alternative location in the city were thwarted by widespread sentiment throughout the city against permitting new social service program within the city limits. This concern became articulated, adopted and implemented as policy by the highest official policymaking components of the city government, including the city commission, the police department and the city's planning and zoning officials and administrators. Ultimately, the city commission, the highest policymaking body of Fort Lauderdale, officially denied Bannum permission to operate its residential program in Fort Lauderdale.

Under the controlling law, there are numerous genuine issues of material fact raising more than an inference regarding the municipal liability of Fort Lauderdale to prevent summary judgment on that issue, comprising the second element of a prima facie case under section 1983. Therefore, we vacate the district court's grant of summary judgment to the city on the inapplicable basis of respondeat superior. Pursuant to Praprotnik and Pembaur, we hold that the defendant-appellee City of Fort

Lauderdale was responsible under color of law for its specific decisions regarding Bannum's location of its residential program in Fort Lauderdale. On remand, the second element of a prima facie case under section 1983 shall be considered satisfied.

The district court has neither addressed plaintiffs-appellants' allegations of constitutional deprivations nor allowed discovery on these issues to enable plaintiffs-appellants to develop their case fully. This case was terminated at a premature stage. On remand, the district court shall provide appropriate time for discovery so that both parties may obtain the evidence necessary to present the facts and law relevant to the district court's determination of the alleged constitutional violations. The district court then will be in a position to determine if plaintiffs-appellants have established the first element of a prima facie case under section 1983, or if their allegations of constitutional violations warrant trial.[30] Barfield, 883

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[30] We observe that the district court's consideration of plaintiffs-appellants' constitutional claims regarding the subject special use permit ordinance, including violation of equal protection, facially and as applied, and due process, should involve analysis of the analogous case of City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In Cleburne, the Supreme Court held that a municipal ordinance requiring a group home for the mentally retarded to obtain a special use permit to operate and the city's subsequent denial of the home's application for such a special use permit was an unconstitutional violation of equal protection as applied because other similar residential uses of property in the area did not require a special use permit to operate. Noting that the city council apparently had been concerned or influenced by the prevailing negative attitude of property owners and community fears, the Court stated:

> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.

City of Cleburne, 473 U.S. at 448, 105 S.Ct. at 3259.

F.2d at 934; Wideman v. Shallowford Community Hosp., Inc., 826 F.2d 1030, 1032 (11th Cir. 1987).

C. FAILURE TO ADDRESS NON-SECTION 1983 CLAIMS

Because it granted summary judgment based upon a respondeat superior theory of liability as to defendant-appellee the City of Fort Lauderdale, the district court did not address plaintiffs-appellants' requests for declaratory and permanent injunctive relief and its pendent state claims. Plaintiffs-appellants seek to enjoin the City of Fort Lauderdale from implementing and enforcing zoning regulations designating Bannum's residential program as a custodial facility, requiring special use permits, and otherwise interfering with the lawful operation of programs such as Bannum's. While Bannum has been precluded from operation in Fort Lauderdale and has lost its contract with the Bureau of Prisons for that city, Bannum remains in the business of providing and operating supervised residential housing for ex-offenders in Florida and elsewhere, and seeks judicial protection should it attempt to open another program in Fort Lauderdale. Bannum's pendent state claims involve interference with contract and unlawful taking.

Although the City of Fort Lauderdale has amended itz zoning ordinance to remove the custodial facility category, the facts of this case show that the city government can change positions, which has been reflected in its application of zoning ordinances. The concerns in this case are that Bannum to date continues to be precluded from operation in Fort Lauderdale, and that the rejection of its application for yet another site is capable of recurring. See Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 (1973); Donovan

v. Sarasota Concrete Co., 693 F.2d 1061, 1064 n.4 (11th Cir. 1982). Concurrent with its consideration of the constitutional issues in this case, the district court has jurisdiction over the pendent state claims. See United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 427 (11th Cir. 1984).

IV. CONCLUSION

Bannum, in conjunction with the Bureau of Prisons, provides an innovative and successful alternative to incarceration for qualified inmates in the last stage of their sentence by assisting their integration into the communities where they will return to live and work upon the completion of their sentences. Not only does Bannum's supervised residential housing for its program participants alleviate prison overcrowding, but also it serves to assist ex-offenders to gain employment upon their release so that they may become productive members of society. While the concerns of the Fort Lauderdale residents are understandable and properly considered by the city government, the apparent attempt by Fort Lauderdale to foreclose Bannum's program within its city limits must be analyzed carefully for constitutional violations. Although we AFFIRM the district court's granting summary judgment to the various municipal governing bodies and individual officials on the bases of absolute and qualified immunity, we VACATE the grant of summary judgment to the City of Fort Lauderdale on the basis of respondeat superior liability and REMAND this case to the district court for further proceedings consistent with this opinion.

APPENDIX C

[Filed DEC 11, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4901

BANNUM, INC., et al,

Plaintiffs-Appellants,

versus

CITY OF FT. LAUDERDALE, FLORIDA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

BEFORE: HANCHETT, Chief Judge, BLACK, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants, Bannum, Inc., and Bannum Properties, Inc., are denied.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

APPENDIX D

[Filed DEC 11 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4901

BANNUM, INC., et al,

Plaintiffs-Appellants,

versus

CITY OF FT. LAUDERDALE, FLORIDA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19 ___,
_____ F.2d _____).

Before: HATCHETT, Chief Judge, BLACK, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE